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UNCLAS SECTION 01 OF 02 MADRID 001075

SENSITIVE
SIPDIS

STATE FOR EUR/WE AND EEB TPP/IPE
STATE PASS USTR FOR D.WEINER AND J.GROVE
STATE PASS U.S. COPYRIGHT OFFICE FOR M.PALLANTE, M.WOODS
COMMERCE FOR 4212/D.CALVERT
COMMERCE ALSO FOR USPTO

E.O. 12958: N/A

TAGS: KIPR ETRD ECPS SP

SUBJECT: SPAIN IPR/INTERNET PIRACY: INTER-MINISTERIAL COMMISSION

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SENSITIVE BUT UNCLASSIFIED - PLEASE PROTECT ACCORDINGLY

¶1. (SBU) In an October 29 meeting, visiting senior U.S. Copyright Office official Maria Pallante and Spanish Culture Ministry official Carlos Guervos discussed the recently formed Inter-Ministerial Commission on Internet piracy. Guervos said the Inter-Ministerial Commission will draft a law to improve and speed up the IPR civil litigation process and also create an administrative mechanism to have infringing content removed from the web. Guervos later told Econoff that the Commission will not attempt to modify the Prosecutor General's (Fiscal) Circular, but predicted that the new legislation will compel the Fiscal to issue a new Circular that will correct the deficiencies of the current one. Septel reports discussion of issues pertaining to the December meeting of WIPO's Standing Committee on Copyrights and Related Rights (SCCR). End Summary.

INTER-MINISTERIAL COMMISSION TO PROPOSE LEGISLATION

¶2. (SBU) Maria Pallante, Associate Register for Policy and International Affairs at the U.S. Copyright Office, met October 29 with Carlos Guervos, Deputy Director General for Intellectual Property at the Ministry of Culture, on the margins of a WIPO/Ministry of Culture-sponsored conference on Intellectual Property and Cultural Heritage in the Digital Environment. Guervos characterized the Council of Ministers' recent creation of an Inter-Ministerial Commission to work on intellectual property infringements on websites (see ref A) as a real example of the will of the Spanish government to tackle the piracy problem. He identified the Commission's mandate as finding effective legal solutions to Internet piracy and said the members would build upon the efforts over the past several months by representatives of the Ministries of Industry, Culture, Justice, and Interior to diagnose the problem and develop possible solutions. In an attempt to speed up the Commission's deliberations, Guervos and representatives of the other three Ministries have been bringing their colleagues from the Foreign Affairs, Economy and Finance, and Education Ministries and the Presidency up to speed on efforts undertaken to date.

¶3. (SBU) The Commission, he said, is to present a draft law to the Council of Ministers by December 31 for approval preparatory to its submission to Congress. While the Commission will also propose measures on public awareness and education - the reason of the Education Ministry's inclusion is the intention to incorporate anti-piracy messages into school curricula - the legislative component is far and away the most important piece, Guervos said.

IMPROVING THE CIVIL JUDICIAL PROCESS

¶14. (SBU) The draft legislation, Guervos continued, will contain both judicial and administrative solutions. The government hopes to amend the civil procedure law to remove obstacles that currently make it extremely difficult for rights-holders to win damages in civil litigation against infringers. For example, the changes would make it possible for judges to require disclosure of individuals' names based on their Internet Protocol addresses in civil cases. The Commission does not intend to address criminal judicial processes, Guervos said, because modifying the Penal Code would be an arduous and controversial undertaking; however, he argued that a robust and agile civil process that offers rights-holders an effective remedy would make criminal prosecution less necessary. In addition, he said, a viable civil process would afford rights-holders the opportunity to present evidence of the earnings of pirate websites from advertising revenues. Once they have met the "commercial profit motive" standard required by the Penal Code and the Prosecutor General's Office (Fiscal) 2006 Circular (see ref C), rights-holders could convert the case into a mixed criminal-civil process, he said.

CREATING AN ADMINISTRATIVE REMEDY

¶15. (SBU) Guervos stated that because, even with these improvements, a judicial remedy will remain difficult, the legislation would also create an administrative mechanism that does not run afoul of privacy and data protection concerns. The law will either create a governmental administrative body or empower an existing body to order Internet Service Providers (ISPs) to take down infringing websites if they are housed in Spain or block them if they are located elsewhere, or at the very least remove infringing material. This administrative remedy, Guervos said, would be rapid and thus would "stop the bleeding" by removing unauthorized content as soon

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as it is reported. He noted that although ISPs have been reluctant to support such a solution, having a law in place would provide them with "cover" in the case of complaints by irate customers. In response to Pallante's question about punishment of repeat offenders who commit willful infringement, Guervos said the law would provide for more definite administrative sanctions against webmasters in those cases, but he did not specify what they would be.

¶16. (SBU) Guervos noted that unlike a "graduated response" system, the Inter-Ministerial Commission's legislative proposal does not contemplate measures against individual internet users or consumers who download material without authorization. As such, he said, it will not change the Spanish public's bad habits or the culture in which unauthorized file-sharing is perceived as not only legal but socially acceptable. That is where the education and public awareness ("consciousness-raising," he called it) components will come into play.

SECURING CONGRESSIONAL APPROVAL

¶17. (SBU) Pallante asked Guervos whether all the Ministries represented on the Commission were on board with the judicial and administrative solutions he had outlined. He replied that the various Ministries had different interests and constituencies, and some were susceptible to lobbying, but he believed that, in light of the mandate and tight deadline imposed by the Council of Ministers, it would be difficult for any Ministry to hinder the Commission's work. Assuming that the GOS submits the draft law to Congress in January, Guervos could not predict how long it would take to get Congress to pass it, though he expected it to be approved sometime in 2010. He noted, however, that since it would be an ordinary, as opposed to an organic, law, it would require only a relative, not an absolute, majority in Congress, which would make the government's task easier and would likely consume less time. Amending the Penal Code, on the other hand, would require an organic or Constitutional law, which would be a much more difficult and lengthy process.

¶18. (SBU) In a follow-up conversation, Econoff asked Guervos whether the Inter-Ministerial Commission was considering amending the

Fiscalia's Circular, an action long sought by rights-holders and the USG, and one that would not require Congressional approval. He replied that the Fiscalia, though part of the Ministry of Justice, is by law independent of the rest of the GOS, which cannot force it to revise the Circular. However, he predicted that the existence of the new IPR enforcement legislation would likely spur and perhaps even compel the Fiscalia to update the Circular, offering an occasion to amend its more problematic provisions.

COMMENT

¶9. (SBU) As outlined by Guervos, the legislation being drafted by the Inter-Ministerial Commission, if passed by Congress, clearly has the potential to achieve results. Rights-holders in Spain have long bemoaned the near-futility of seeking redress via civil litigation, and addressing this problem would represent a concrete advance. The proposed administrative solution, while not as comprehensive as similar attempts in other European countries or as inclusive as rights-holders would like, could, if properly implemented, significantly reduce the availability of infringing content. The fact that the Ministry of Culture is taking its responsibility so seriously and is pushing for this relatively ambitious proposal to be adopted so swiftly is also an encouraging sign. In this regard, Pallante and Guervos agreed that, given the potential importance of the Commission and proposed legislative changes, it would be useful for Guervos to travel to Washington in the near future to brief USG and U.S. private-sector stakeholders as developments unfold. What remains to be seen is whether the Commission will be able to keep to its hyper-accelerated timeline and present its proposals in the nine weeks remaining in the year, and whether the government will follow up expeditiously in submitting the draft law to Congress and pressing for its passage. End Comment.

¶10. (U) This cable was cleared by Maria Pallante.